IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 04/07/2003

Coram

The Hon'ble Mr. Justice P. SATHASIVAM

Criminal Appeal No. 98 of 2002

Selvam,
S/o Sundararaj Pillai,
Ombathuveli Keela Theru,
Thirukattupalli Post,
Thiruvaiyaru Taluk, Thanjavur District. .. Appellant/Accused.

-Vs-

State represented by
Inspector of Police,
Narcotic Intelligence Bureau,
Nagapattinam (Crime No.1/99) .. Respondent/Complainant.

Criminal Appeal filed under Section 374, Code of Criminal Procedure against the conviction and sentence passed by the Special Judge for Essential Commodities Act Cases, Thanjavur made in C.C. No.83 of 1999 by judgment dated 21-12-2001.

!For Appellant :: Mr. S. Shanmigavelayutham

^For Respondent :: Mr. K. Abudukumar Rajarathinam, Govt.,
Advocate (Criminal Side)

:JUDGMENT

The accused in C.C.No.83 of 1999 on the file of the Special Judge for Essential Commodities Act cases, Thanjavur is the appellant in the above appeal. He was tried for offences punishable under Section 8 (c) read with 20(b)(i) and 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the Act"). On being found guilty under Section 8 (c) read with 20 (b)(i) of the Act, he was sentenced to undergo R.I. for 18 months and to pay a fine of Rs.100/- in default of payment of fine to undergo R.I. for one month; and under Section 22 of the said Act, he was sentenced to undergo R.I. for 10 years and to pay a fine of Rs.1 lakh in default of payment of fine to undergo R.I. for 6 years, and both the sentences were ordered to run concurrently. Against the said conviction and sentence, the accused preferred the present appeal before this Court.

2. Heard Mr. S. Shanmugavelayutham, learned counsel for the appellant and Mr. K. Abudukumar Rajarathinam, learned Government Advocate (Criminal Side) for the State.

3. The case of the prosecution is briefly stated hereunder:
On 19-1-1999 at about 13.00 hours P.W.4, Inspector of police, Narcotic Intelligence Bureau, Nagapattinam was in his office. At that time, his informant passed on an information to the effect that the accused was carrying property like 'Ganja', and 'Ganja' tablets. He also informed that he can be apprehended near Kittappa bridge, Mayiladuthurai. The above information was recorded by P.W.4 and the same was sent to P.W.5, Inspector of police. Since at the relevant time P.W.5 was at Thanjavur, the matter was conveyed over phone. On receipt of the information, P.W.5 authorised P.W.4 to proceed further. P.W.4 left the Police Station along with P.W.2-Head Constable and one Subramanian-Senior Selection grade Head Constable and also one Raja, who was standing near a tea stall, towards Kittappa bridge around 4 P.M. At 4.15 P.M. the informant identified the accused and immediately the persons accompanied P.W.4 caught hold of the accused and informed him that they are from Narcotic Intelligence Bureau and they want to search him. The accused was also informed about his legal right, namely, that he is entitled to be searched in the presence of a Magistrate or a gazetted officer. On satisfying himself, the accused told that they can search him and he has no objection for the same. P.W.4 searched the accused in the presence of witnesses and seized a polythene bag from the left hand of the accused. On opening of the polythene bag, he found One K.G. of Ganja and 10 Nitrazepam tablets. Thereafter, P.W.4 had taken 50 grams of Ganja from the polythene bag and two Nitrazepam tablets, packed them separately in the presence of witnesses. After affixing the seal, writing the name of the accused and his address, he obtained the signature of the accused as well as witnesses. The balance of Ganja and Nitrazepam were packed in a separate bag and the same was sealed. The samples and the balance of Ganja and Nitrazepam are M.Os.2 to 4. The cover was also sealed, signed by the accused and attested by witnesses in the same manner. P.W.4 has also prepared a mahazar-Ex.P-3 at 16.30 hours. P.W.4 after informing him that possession of Ganja and Nitrazepam by him is an offence, arrested the accused on the spot around 17.45 hours. The arrest warrant is Ex.P-4. As per the statement of the accused, he was taken to Kumbakonam, Thanjavur, Needamangalam, Thiruvarur and thereafter to the Police Station at Nagapattinam and a case was registered in Crime No.1 of 1999 under Section 8 (c) read with 20 (b) (i) and Section 22 of the N.D.P.S.Act. The First Information Report is Ex.P-6. Thereafter, P.W.4 prepared a report and sent the same to P.W.5. The said report is Ex.P-7. On receipt of the report and F.I.R., P.W.5 started his investigation. He went to the place of occurrence and prepared a Sketch-Ex.P-8. He examined 5 witnesses and recorded their statements. He sent the accused and the contraband to the Court. Thereafter, P.W.5 made a requisition to the Court for sending the sample to Analyst for examination. As requested, the Court sent the samples on 4-2-99 to the Analyst. P.W.1-Analyst on receipt of the sample, examined the same and it was found to contain Ganja material. She also examined the sample of tablets and found that the same is Nitrazepam. She also prepared and submitted a report which is Ex.P-1. The strip of Nitrazepam was marked as M.O.1. On receipt of the report from P.W.1, P.W.5 examined her and recorded

her statement. After completion of investigation, P.W.5 filed charge sheet against the accused on 10-4-19 99 under Section 8 (c) read with 20 (b) (i) and 22 of the N.D.P.S. Act.

4. When the accused was questioned under Section 313, of the Code of Criminal Procedure on the basis of the incriminating materials made against him, he denied each and every circumstance put up against him as false and contrary to the facts. He pleaded innocence. No witnesses were examined on his side.

5. Though several contentions have been raised in the Memorandum of Grounds of Appeal, Mr. S. Shanmugavelayutham, learned counsel appearing for the appellant, mainly advanced his argument to the effect that the evidence available on record do not show that the materials said to have been seized from the accused on 19-01-99 are the materials which had been sent to the laboratory for testing. He also contended that Form No.95 though available in the records, had not been sent to the Court and marked as an Exhibit on the side of the prosecution. In the absence of Form No.95 before the Court and no explanation for not marking the same from the side of the prosecution, though P.W.4-S.I. of Police and P.W.5-Inspector of Police were examined, it raises a genuine doubt about the prosecution case; accordingly the conviction of the accused cannot be sustained.

6. On the other hand, Mr. Abudukumar Rajarathinam, learned Government Advocate, would contend that inasmuch as the prosecution has complied with all mandatory provisions and the same was rightly accepted by the Special Court, there is no ground for interference in this appeal.

7. Inasmuch as the learned counsel for the appellant is mainly attacking the lacuna in the prosecution case, namely, not producing Form No.95 before the Court which raises genuine doubt about the prosecution case, I am of the view that it is unnecessary for me to consider the other aspects.

8. In order to appreciate the only contention, it is useful to refer Section 55 of the Act, which reads thus:
"Section 55. Police to take charge of articles seized and delivered.- An officer in-charge of a police station shall take charge of and keep in safe custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officer-in-charge of the police station."

There is no dispute that it was P.W.4-Sub Inspector of Police, who on the basis of information given by the informant, reached the place of occurrence, seized the contraband and arrested the accused. Based on the report of P.W.4, it was the Inspector of Police-P.W.5- who continued the investigation. I have already referred to Section 55 which mandates the police officer concerned to take charge of and keep in safe custody all articles seized under this Act. The Section enables the officer to affix his seal to such articles, take samples of and from them and all the samples so taken be sealed with a seal of

the officer in charge of the police station. It is not disputed that samples were sent to P.W.1 for chemical analysis. Though P.Ws.4 and 5 have stated that the accused and the contraband were sent to Court, admittedly Form No.95 had not been sent to Court and there is no evidence for the same. The original Form No.95 is very well available in the records produced by the learned Government Advocate. In the light of the fact that the same is available in the records, it is clear that the same has not been marked by the prosecution either through P. W.4-Sub Inspector of Police, or through P.W.5-Inspector of Police. P.W.4 in his chief examination has stated that
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P.W.5 in his chief examination has stated that, "

Though P.Ws.4 and 5 have deposed that the contraband and the accused were sent to Court, as rightly argued by the learned counsel for the appellant, in the light of the fact that Form No.95 is very well available with the records, it is clear that the same had not been marked. In the absence of specific reference regarding sending the contraband namely 'Ganja' and 'Nitrazepam' tablets to the court concerned in the manner as provided from the evidence of P.Ws.4 and 5 who are Sub Inspector of Police and Inspector of Police respectively, I am satisfied that Sections 50, 55 and 57 of the Act are not scrupulously followed by them who effected the arrest of the accused and seizure of the contraband.
In this regard, learned counsel for the appellant has very much relied on a decision of R. Balasubramanian, J., in Ananthi Vs. State represented by N.I.B. C.I.D., Trichy, reported in (2001) M.L.J. 402. In that decision, the learned Judge had an occasion to consider similar plea. The following conclusion of the learned Judge is relevant: (para 9)

"9. Analysing the materials on record, in the context of the law laid down by the Hon'ble Supreme Court of India and the arguments advanced by the learned counsel for the appellant, I find that the prosecution had definitely failed to establish that the materials shown to have been seized on 13-7-1996 from the accused are the materials that have been sent to the laboratory. Form 95 which was sent along with the case property on the date of the arrest of the accused to the Court is not produced as an exhibit in this case. Form 95, along with the case properties, are stated to have been received back from the remand Court through a police constable. What was the endorsement of the Court on Form 95 while returning the property to the investigating agency can very well be seen only when Form 95 is produced before Court. It may be the statement of the Court asking the police to keep it in safe custody and produce it later before the Special Court or it may also contain any defects noticed by the Court at the time when the case properties were produced before it....."

The said decision is directly applicable to the case on hand and supports the stand taken by the learned counsel for the appellant. In our case, I have already referred to the evidence of P.Ws.4 and 5 and the presence of Form 95 in the case records produced by the learned Government Advocate. There is no dispute that the relevant material, namely, Form 95 was not sent to the Court

and marked as an exhibit through prosecution witness, more particularly P.Ws.4 and 5. All the above facts raise a serious doubt about the prosecution case. By giving the benefit of doubt to the accused, he is acquitted forthwith of the offence for which he was charged, tried and convicted. Consequently, the

Appeal is allowed and the judgement under challenge is set aside. The fine amount, if paid, shall be refunded to the appellant.

R.B.

Index: Yes.
Internet: Yes.

To:-
1) The Special Judge under Essential Commodities Cases,
Thanjavur.

2) The Inspector of Police, Narcotic Intelligence Bureau,
Nagapattinam.

3) The Superintendent, Central Prison, Tiruchirapalli.

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